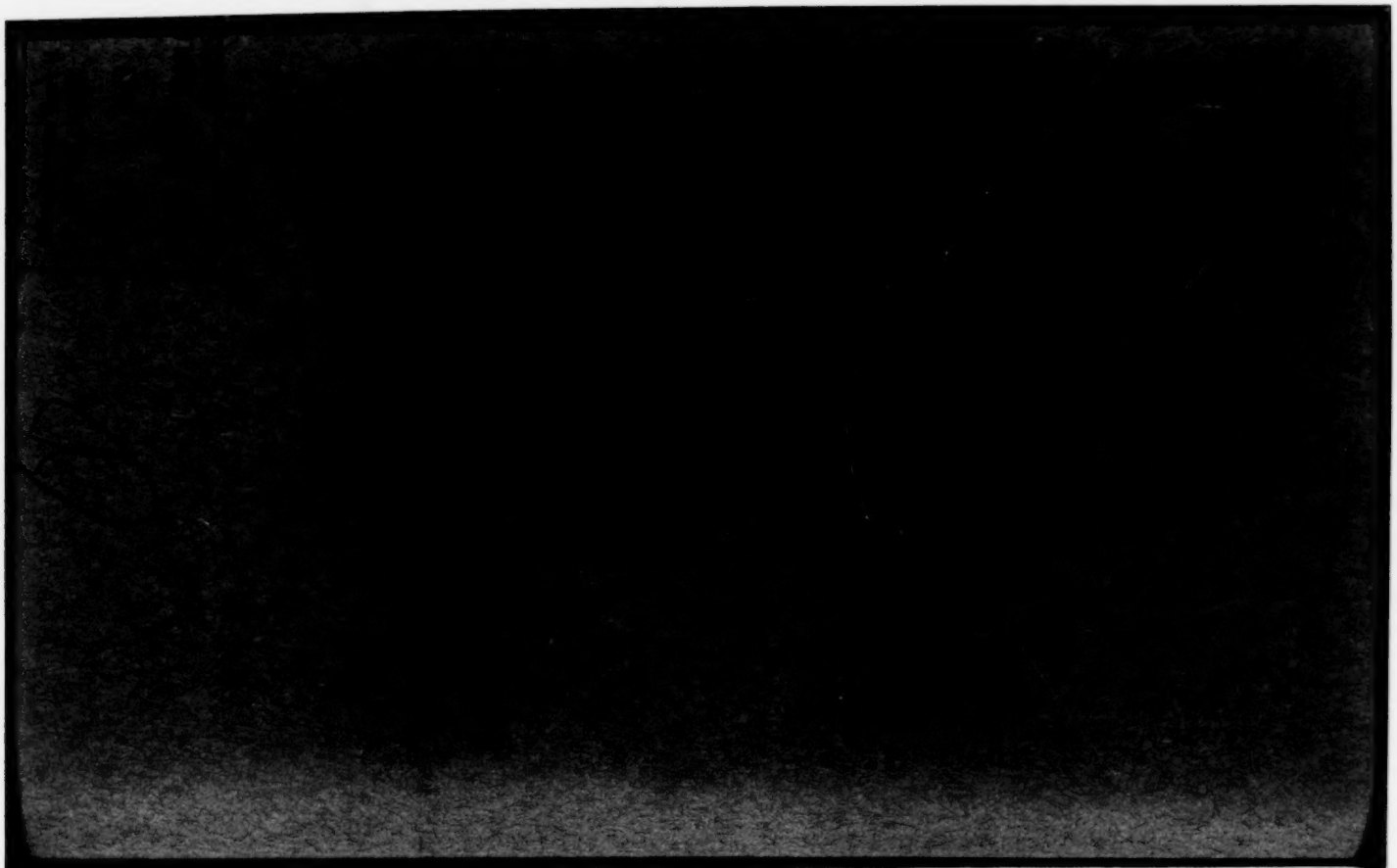

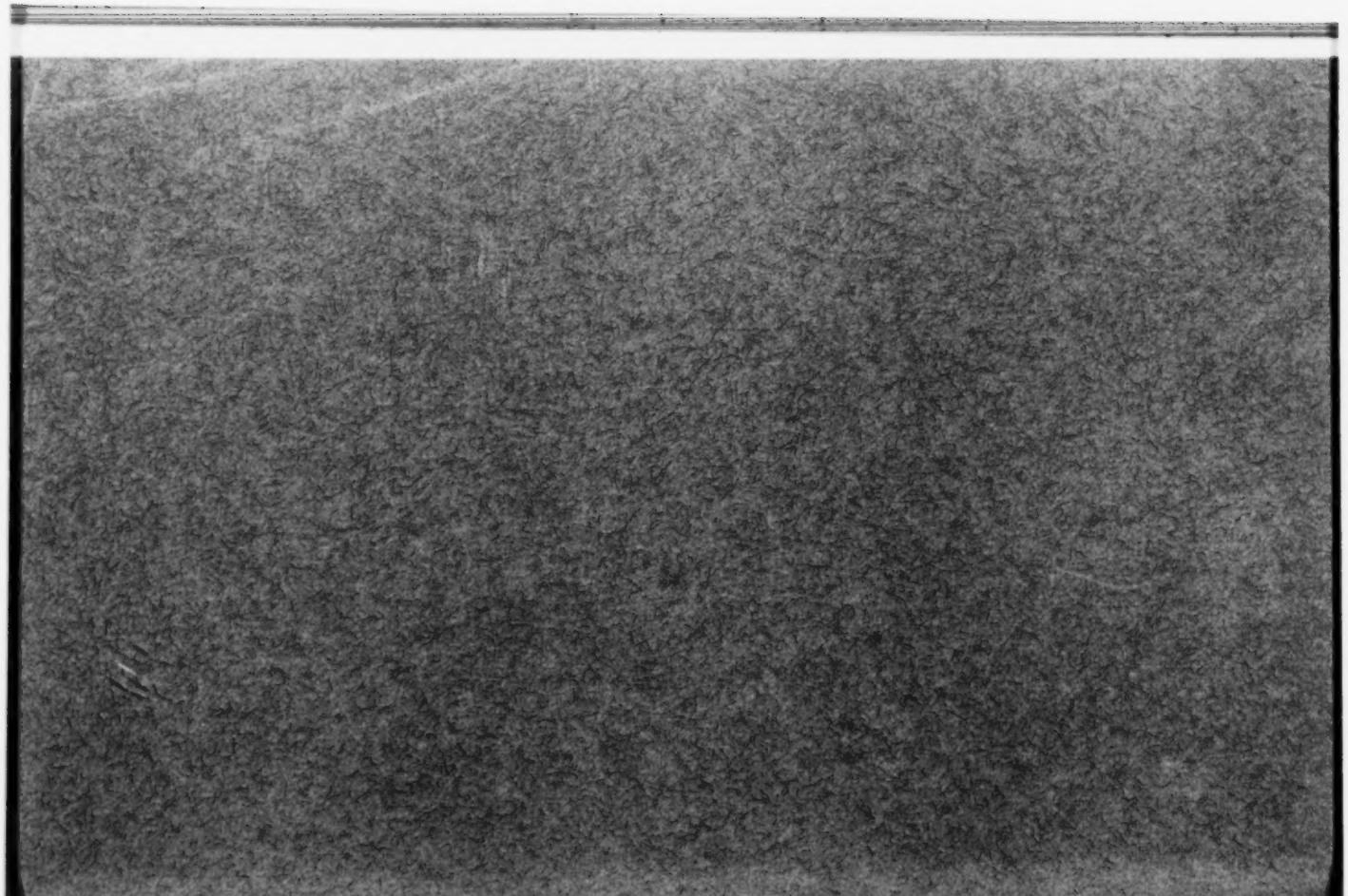

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement	3
Argument	5
Conclusion	12
Appendix	13

CITATIONS

Cases:	
Chicago & Alton R. R. v. *Tranbarger*, 238 U. S. 67	9
Cox v. *Hart*, 260 U. S. 427	8
Lewis v. *Fidelity & Deposit Co.*, 292 U. S. 559	8
Mugler v. *Kansas*, 123 U. S. 623	8
Mulford v. *Smith*, 307 U. S. 38	9
New York Cent. R. R. v. *United States* (No. 2), 212 U. S. 500	9
Oklahoma v. *Atkinson Co.*, 313 U. S. 508	8
Rahrer, In re, 140 U. S. 545	8
Reynolds v. *United States*, 292 U. S. 443	8
Ruppert, Jacob v. *Caffey*, 251 U. S. 264	9
Samuels v. *McCurdy*, 257 U. S. 188	9
Southport Petroleum Co. v. *National Labor Relations Board*, No. 67, October Term, 1941	11
Union Bridge Co. v. *United States*, 204 U. S. 364	9
United States v. *Appalachian Electric Power Co.*, 311 U. S. 377	5, 6, 7, 10, 11
United States v. *Freight Ass'n*, 166 U. S. 290	8
Statutes:	
Federal Power Act of 1935, 49 Stat. 838 (16 U. S. C. secs. 797 (g), 817):	
Sec. 4 (g)	13
Sec. 23 (b)	13
Rivers and Harbors Act of 1899, 30 Stat. 1151:	
Sec. 9	9
Miscellaneous:	
H. Rep. No. 1318, 74th Cong., 1st Sess., p. 23	9
S. Rep. No. 621, 74th Cong., 1st Sess., p. 43	9

441163—42

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 862

PENNSYLVANIA WATER & POWER COMPANY,
PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Federal Power Commission together with its findings and conclusions, is reprinted in the record at pages 201–212. The opinion of the United States Court of Appeals for the District of Columbia (R. 2307–2322) is reported in 123 F. (2d) 155.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia (R. 2322) was entered on October 20, 1941. The petition for a

writ of certiorari was filed January 12, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Susquehanna River, at Holtwood, Pennsylvania, is a navigable water of the United States.

2. Whether Section 23 (b) of the Federal Power Act of 1935, making it unlawful "to construct, operate, or maintain any dam * * * in any of the navigable waters of the United States * * * except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter" applies to dams constructed and operated before the passage of the Act.

3. Whether Congress has impliedly consented to the construction, operation, and maintenance of petitioner's dam and power plant on the Susquehanna River.

4. Whether the maintenance of an unlicensed project may be enjoined only under Section 9 of the Rivers and Harbors Act of 1899, or may also be prohibited by direct order of the Federal Power Commission.

5. Whether the form of the order of the Federal Power Commission was appropriate in the circumstances of this case.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra*, pp. 13–14.

STATEMENT

Petitioner owns, maintains, and operates a dam, reservoir, power house, and other incidental works located on the Susquehanna River at Holtwood, Pennsylvania. This project was constructed between 1905 and 1909 without the express consent of Congress, and petitioner possesses no permit, right-of-way, or authority for its maintenance (R. 7, 208). On September 2, 1938, the Federal Power Commission issued an order (R. 27–28) directing petitioner to show cause why appropriate proceedings should not be instituted against it for operating and maintaining its power project across the Susquehanna at Holtwood without a license granted pursuant to the Federal Power Act or a permit or valid existing right-of-way granted prior to June 10, 1920. On October 10, 1938, petitioner filed an answer (R. 28) admitting the operation and maintenance of the project at Holtwood, but denying that the Susquehanna River was a navigable water of the United States and that the Commission had jurisdiction to institute any proceedings. Thereupon, on November 1, 1938, the Commission issued an order (R. 29–30) directing an investigation to determine all facts relating to the navigability of the river and

the authority under which the project was operated and maintained and to determine "whether an order of the Commission, appropriate, expedient and in the public interest should be issued to conserve and utilize the navigation and water power resources of said region." After a hearing, the Commission concluded that the Susquehanna River was navigable water of the United States from above petitioner's project in Pennsylvania to the mouth of the river in Maryland, that petitioner was maintaining and operating the power project without a license granted pursuant to the Federal Power Act or in accordance with valid authority granted prior to June 10, 1920, that continued maintenance and operation without a license was unlawful under Section 23 (b) of the Act, and "that an appropriate order in this case is an order requiring the respondent to apply for a standard form license under the Act" (R. 201–212).

The Commission found as facts, which are not disputed, that there was an annual average flow of water at Holtwood of approximately 35,000 cubic feet per second, that, in the vicinity, the river in its natural condition was between 600 and 3,000 feet in width and from 3 to 30 feet in depth, and that obstructions were not so serious as to render navigation impossible (R. 208). It also found that at various times since 1797 navigation on the

river had been facilitated by construction of canals along the river (R. 208–209), that prior to the completion of the canals, arks and rafts were navigated from Wilkes-Barre, Pennsylvania, to Havre de Grace, Maryland, carrying annual cargoes sometime reaching the value of $5,000,000 (R. 209), that with the advent of railroads navigation on the river declined, but that navigation in substantial amounts continued until the beginning of the present century when the canal was washed out by a flood and abandoned. It was found further that boats, barges, and dredges operate from practically the head of the Holtwood Pool down to the dam (R. 210), that very little excavation was necessary in the interstate stretch below the dam to permit passage of boats drawing 6 to 9 feet (R. 210–211), and that if locks were constructed in the Holtwood Dam and in the Conowingo Dam in Maryland, navigation could be conducted from the Holtwood Dam down to and beyond the State of Maryland (R. 211).

On petition for review (R. 1–23), the Court of Appeals affirmed the Commission's order (R. 2307–2322).

ARGUMENT

The court below, relying on the decision of this Court in *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, held that the Susquehanna was a navigable water of the United States

(R. 2309–2317), that Section 23 (b) of the Federal Water Power Act of 1935, making it unlawful "to construct, operate, or maintain any dam * * *" in a navigable water of the United States without a license applied to dams constructed before the passage of the Act (R. 2320), that petitioner's dam was an unlawful structure placed in the river without the consent of Congress, and that the Commission's order, directing petitioner to apply for a license, was valid under Section 4 (g) of the Act (R. 2320–2321). This decision was clearly correct.

1. In *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, this Court held that a river is navigable, not only if navigable in its natural condition, but also if capable of being made so by improvements at a reasonable cost, and that, under this test, the stretch of the New River there under consideration was navigable. A comparison of the physical characteristics of the Susquehanna and the New and the history of transportation on the two rivers, as set forth in the opinion of the court below (R. 2309–2317), leave no doubt that, under the rule of the *Appalachian* case, the Susquehanna is navigable. As the court below declared, "the differences existing (in favor of navigability) are all in favor of the Susquehanna" (R. 2316–2317). Moreover, even apart from the ruling in the *Appalachian* case,

the same result would have been compelled by earlier decisions of this Court.[1]

The fact that the Secretary of War in 1904 found the river non-navigable in reference to a railroad bridge at Havre de Grace (Pet. 11–12) is of little weight, since, as the court below properly observed (R. 2319), the decision was made in the view that navigable waters of the United States were confined to those susceptible of being used in their ordinary condition as highways of commerce. Moreover, as petitioner points out in its petition (Pet. 14), that decision was reversed by another Secretary of War in 1914.

Congress may lawfully require a license, including provisions in the interest of flood control and power, as a condition of the construction or maintenance of a project on a navigable river. In the *Appalachian* case, *supra,* this Court held that the power of Congress over navigable waters of the United States was not limited to control of navigation, but extended as well to "flood protection, watershed development" and "recovery of the cost of improvements through utilization of power" (311 U. S. at 426), and that the United States "may make the erection or maintenance of a structure in a navigable water dependent upon a license" (311 U. S. at 424) even though the river "is not

[1] See the concurring opinion of Mr. Justice Edgerton in the court below (R. 2321).

needed for navigation at this time" (311 U. S. at 426). See *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508.

2. The maintenance of petitioner's project without a license is prohibited by the Federal Power Act of 1935. Section 23 (b) of the Act makes it unlawful "to construct, operate, or maintain" any dam in a navigable water of the United States "except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter." Petitioner contends, however, that its dam was a lawful project, operated before the passage of the Act, with the implied consent of Congress, and that Section 23 (b) was not intended to apply to such dams. But the provision in express terms applies to the "maintenance" as well as the construction of a dam, and the explicit reference to permission granted prior to June 10, 1920, the date of the original enactment of the Federal Water Power Act, leaves no doubt that dams constructed prior to that date without licenses were intended to be included within the statutory prohibition.

Since the maintenance and operation authorized by the license are *in futuro,* petitioner's suggestion (Pet. 32) that the Commission is seeking to give the Act retroactive effect is plainly baseless.[2]

---

[2] See *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 571; *Reynolds* v. *United States*, 292 U. S. 443, 449; *Cox* v. *Hart*, 260 U. S. 427, 435; *Mugler* v. *Kansas*, 123 U. S. 623; *In re Rahrer*, 140 U. S. 545, 564; *United States* v. *Freight Ass'n*,

Congress has never consented to the construction or maintenance of petitioner's project by license or otherwise. Petitioner concedes that Congress has never expressly consented to the construction of this dam and that a federal permit, right-of-way, or authority for operation and maintenance of the dam has never been secured (R. 7). The decision of the Secretary of War as to the navigability of the Susquehanna in reference to a railroad bridge, on which petitioner relies, is clearly not consent to the construction and maintenance of this dam (R. 2318). In any event long silence and acquiescence in the operation of a dam is no bar to a subsequent order of removal. *Union Bridge Co.* v. *United States,* 204 U. S. 364, 400.

3. The order of the Commission directing petitioner to apply for a license was authorized by Section 4 (g) of the Federal Power Act of 1935. Section 4 (g) was enacted for the express purpose of enabling the Commission to issue appropriate orders without the necessity of instituting court proceedings for the removal of the dam under Sections 9 and 12 of the Rivers and Harbors Act of 1899, 30 Stat. 1151–1152. (See H. Rep. No. 1318, 74th Cong., 1st Sess., p. 23; S. Rep. No. 621,

166 U. S. 290; *New York Cent. R. R.* v. *United States* (No. 2), 212 U. S. 500; *Chicago & Alton R. R.* v. *Tranbarger*, 238 U. S. 67; *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, 301; *Samuels* v. *McCurdy*, 267 U. S. 188, 193; *Mulford* v. *Smith*, 307 U. S. 38, 51.

74th Cong. 1st Sess., p. 43.) The express authority contained in Section 4 (g) "to issue such order as it (the Commission) may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region," when read in the light of the conditions prescribed for licenses (Federal Power Act, Sec. 10, 49 Stat. 842, 16 U. S. C. § 803), leaves no doubt that the Commission is authorized to impose such conditions as are constitutionally permissible under the rule of the *Appalachian* case. Petitioner's argument (p. 31) that Section 4 (g) authorizes the Commission only to order investigation, and to instigate judicial proceedings is plainly inconsistent with the language of the section, which authorizes it both "to order an investigation" and "to issue such order as it may find appropriate," etc.

Petitioner contends (Pet. 28–30) that the order amounts to an attempt to secure compliance with otherwise unlawful regulations as the price of not ordering the removal of the project, and that, since the Commission has found that removal would not be in the public interest, the order is therefore an abuse of discretion. The argument manifestly proceeds on the mistaken assumption that all regulation not directly concerned with removing obstructions to the movement of vessels is unlawful. This view was expressly rejected in the *Appalachian* case, *supra*.

Petitioner's further contention (Pet. 27–28) that the order is void because it compels petitioner to apply for a license without any alternative is similarly without substance. As the rule to show cause issued by the Commission expressly recites (R. 27–28; see also R. 201–202), the sole issue in the proceeding was whether petitioner should be required to apply for a license as a condition of continued operation and maintenance. Nowhere in the record is there any indication that the Commission purported to compel operation and maintenance of petitioner's project against its will. In these circumstances, the order purports only to require a license if operation and maintenance of the dam continue. This is, in effect, exactly what this Court ordered in the *Appalachian* case, when it instructed the District Court (311 U. S., at 429) "to enter an order enjoining the construction, maintenance or operation of the Radford project otherwise than under a license, accepted by the respondent within a reasonable time, substantially in the form tendered respondent by the Federal Power Commission." The question whether petitioner could be prevented from removing its structure should it so desire in the future may be left for determination when and if it should arise. (Cf. *Southport Petroleum Co.* v. *National Labor Relations Board,* No. 67, October Term, 1941.)

CONCLUSION

The decision of the court below is clearly correct. There is no conflict of decisions. For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
MELVIN H. SIEGEL,
ELLIS LYONS,
Attorneys.

RICHARD J. CONNOR,
General Counsel.
WALLACE H. WALKER,
Assistant General Counsel,
Federal Power Commission.

FEBRUARY 1942.